

ORIGINAL

IN THE SUPREME COURT OF OHIO

IN THE MATTER OF THE
COMPLAINT OF THOMAS &
DERRELL WILKES

Appellants

vs.

OHIO EDISON COMPANY

Appellee.

) CASE NO. 11-0737
)
)
)
)

) **On Appeal from the Decision of the Public**
) **Utilities Company of Ohio in Case No.09-**
) **682-EL-CSS**
)
)
)

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INTRODUCTION

Incredulously, Ohio Edison maintains the position that a Court of Common Pleas is the appropriate tribunal to interpret and enforce the National Electrical Safety Code (“NESC”), despite the Public Utilities Commission of Ohio (“PUCO”) being charged with this duty pursuant to the Ohio Administrative Code, and in spite of the fact that the PUCO has ruled, at this point, that the NESC provides no guidance as to how to remedy an NESC distance violation; i.e., whether or not a violation thereof recommends that the structures or transmission lines be moved. So, it makes no sense that the very body charged with interpreting and enforcing the NESC does not know what to do with the complex technicalities of the NESC, but a Court of Common Pleas does.

According to Ohio Edison, it has the ability to construct its transmission lines at any height, five or even ten feet off the ground, which would prohibit the construction of homes and the development of land, thus stifling the economic growth of our society, which is so heavily dependent on home construction.

STATEMENT OF FACTS

A. Ohio Edison’s Easement is Irrelevant to the PUCO’s Exclusive Jurisdiction Over Service-Related Matters.

Contrary to Ohio Edison’s position, this case, which was brought pursuant to the PUCO’s exclusive jurisdiction, clearly involves a service-related issue. If the PUCO Complaint does not involve a service-related issue, then the Common Pleas Court decision ordering the Appellants to move the storage shed and swimming pool is clearly

in error. This is the very reason (uniformity of decisions) that this issue must be heard and decided by the PUCO, to the exclusion of Eighty-eight Courts of Common Pleas¹.

Furthermore, the Appellants properly stated reasonable grounds for their Complaint. The Appellants alleged that the location of the 69kV transmission lines were unlawful because they did not comport with the NESC as mandated by Ohio Admin. Code 4901:1-10-06 (“Therefore, we request that the Public Utilities Commission of Ohio require Ohio Edison to move their transmission lines to a distance that complies with the National Electrical Safety Code; ***) (Formal Complaint, August 5, 2009).

David Kozy, Ohio Edison’s engineer who attested under oath in his affidavit submitted in the Mahoning County Court of Common Pleas, and attached to the Appellants’ Formal Complaint filed in the PUCO, stated that: “It is his expert and professional opinion that the above-ground swimming pool and storage shed on the Wilkes property have created an unsafe and hazardous condition that present an imminent and ongoing risk of injury *that unduly interferes with the safe and efficient operation of the 69kV transmission lines.*” (Formal Complaint, Exhibit A, Kozy Affidavit, ¶13) (emphasis added). David Kozy unequivocally characterized the proximity of the transmission lines to the storage shed and swimming pool as a *service-related issue*.

Since 1993 the Appellants have maintained an above-ground swimming pool and a storage shed (“structures”) on their property with no objections, safety issues or problems from Ohio Edison, until Ohio Edison filed a Complaint in the Mahoning

County Court of Common Pleas on April 9, 2009, Case No. 2009-CV-01280 seeking

¹ This is the very argument Ohio Edison (First Energy) made before *this* Court in *DeLost v. First Energy*, Case No. 2008-1329.

declaratory and injunctive relief relative to their Easement. (PUCO Entry, Feb. 23, 2011, ¶2) (“Common Pleas Case”).

B. Ohio Edison Actually Concedes that the Issue Before the PUCO is Service-Related.

In their Merit Brief, p.3, Ohio Edison clearly argues that a service-related issue exists with regard to the storage shed and swimming pool at issue. Ohio Edison writes:

Because the structures violated the NESC minimum safe distance rules, the presence of the pool and shed created a safety hazard for both the Appellants (or anyone else who used the pool or shed) and Ohio Edison employees, *and a reliability issue for Ohio Edison customers served by the line*². Accordingly, invoking its right under the easement, Ohio Edison asked the Appellants to move the structures.

Id. (emphasis added). If an electrical transmission “reliability issue” is not a “service-related issue,” then nothing is, and Ohio Edison’s arguments before the Mahoning County Court of Common Pleas must be viewed as disingenuous. Service-related issues fall squarely within the PUCO’s exclusive jurisdiction.

C. Again, Ohio Edison’s Common Pleas Case is Irrelevant to the PUCO’s Exclusive Jurisdiction Over Service-Related Matters and the Interpretation and Enforcement of the NESC, as Prescribed in the Ohio Administrative Code.

Ohio Edison filed their Complaint in the Mahoning Court of Common Pleas on April 9, 2009. On June 4, 2009, this Court announced its decision in *Corrigan v.*

Illuminating Company (2009), 122 Ohio St.3d 265. In *Corrigan*, this Court reemphasized

that: “The broad jurisdiction of PUCO over service-related matters does not affect

² Ohio Edison makes this argument despite the fact that there has never been a service-related issue with the 69kV transmission at issue; nor has there *ever* been a safety issue for any person.

“the basic jurisdiction of the court of common pleas * * * in other areas of possible claims against utilities, including pure tort and contract claims.” *Id.* at ¶9 (Emphasis added).

This Court found that the requirement that electrical utilities follow the NESC guidelines (Ohio Admin. Code 4901:1-10-06) falls within the exclusive jurisdiction of the PUCO comes from the same Ohio Administrative Code Section that requires electrical utilities to inspect its transmission facilities at least once every year (Ohio Admin. Code 4901:1-10-27(D)(2)), and to conduct the inspections pursuant to written programs (Ohio Admin. Code 4901:1-10-27(E)(1)). *Corrigan*, at ¶15.

D. Appellants Informed the PUCO that there was a Pending State Court Action, Despite that Being Irrelevant to the PUCO’s Jurisdiction to Hear and Decide this Case.

Attached to the Appellants’ Complaint filed in the PUCO as Exhibit A, was the Affidavit of Ohio Edison’s engineer, David Kozy. (Formal Complaint, August 5, 2009). David Kozy’s Affidavit was captioned as follows:

**IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO**

OHIO EDISON COMPANY
76South Main St.
Akron, Ohio 44308

Plaintiff,

vs.

**AFFIDAVIT OF DAVID R.
KOZY, PROFESSIONAL
ENGINEER**

**THOMAS E. WILKES and
DERRELL C. WILKES,
8230 Greenwood Place
Youngstown, Ohio 44512-5809**

Again, not that the filing of the Common Pleas Case has any effect on the PUCO's exclusive jurisdiction to hear and decide *this* case, reading the caption of David Kozy's affidavit clearly showed the experienced attorneys at the PUCO that there was a pending lawsuit related to the same issue in the Mahoning Court of Common Pleas.

Perhaps the PUCO's knowledge of the pending Common Pleas case is the reason the PUCO waited Eighteen (18) months to decide this case, and vice versa, the Common Pleas Court's knowledge of the pending PUCO case, caused it to wait more than a year to rule, each body looking to each other for a ruling.

E. The Commission Dismissed the Appellants' Complaint Without Taking Evidence and Despite Ohio Edison's Argument that Such a Procedure was Not Allowed by the PUCO, Finding that it Did Not Have Expertise Interpreting Easements.

While it may be true that the PUCO does not have expertise interpreting easements, that is not what it was asked to do in this case. The PUCO was asked to interpret and enforce the NESC.

As an initial matter, the PUCO dismissed the Appellants' Complaint without a hearing and the taking of evidence, despite Ohio Edison's argument that there was no such procedure in the PUCO. Specifically, in its *Memorandum of Ohio Edison Company Contra to Motion to Order Ohio Edison to Move 69kV Lines to Comport With National Electrical Safety Code by Thomas and Derrell Wilkes*, Ohio Edison argued that the PUCO does not allow for summary judgment. Ohio Edison argued:

The Commission has noted that its rules do not provide for summary judgment. See, e.g., *Weir v. Ohio Edison Co.*, No. 89-486-EL-CSS, Entry Dated May 1, 1989, ¶5 (denying summary judgment because R.C. 4905.26 'makes no provision for the dismissal of actions based upon affidavits and other evidence submitted prior to the onset of a hearing'); *Hershberger v.*

The East Ohio Gas Co., No. 87-1513-GA-CSS, Entry dated Oct. 27, 1987, ¶7.

The Commission has made it clear that it acts *after* a hearing, and the Complainants should not be allowed to bypass that process.

(Memorandum of Ohio Edison Company Contra to Motion to Order Ohio Edison to Move 69kV Lines to Comport With National Electrical Safety Code by Thomas and Derrell Wilkes, p. 9).

Despite the PUCO's improper dismissal of the Appellants' case, holding that it did not state reasonable grounds. The actual reason for the dismissal as evidence through the February 23, 2011 Entry was because the PUCO claimed it lacked jurisdiction. Clearly, the Appellants stated reasonable grounds in their Formal Complaint.

Nevertheless, the PUCO's dismissal was truly equivocal because it held that it would take jurisdiction over this case if the Mahoning County Court of Common Pleas is reversed. (PUCO Entry Dated February 23, 2011, ¶19) ("The question of how to resolve the NESC violation would require the Commission's expertise only if the decision of the Mahoning County Common Pleas Court were to be reversed and it was found that the easement did not provide a basis for compelling removal of the structures to a safe distance.")

ARGUMENT

Proposition of Law No. I:

The Interpretation and Enforcement of the NESC Clearly Involves the Interpretation of the Ohio Administrative Code 4901:1-10-06.

The PUCO correctly determined, and Ohio Edison does not dispute the PUCO's finding that:

The only dispute concerns the remedy, i.e., whether the complainants' property or the power lines should be moved. The NESC only establishes minimum clearances. *[The NESC] does not provide guidance on whether the structures or facility should be moved.*

(PUCO Entry February 23, 2011, ¶15.)

Despite this finding, Ohio Edison argues that a Court of Common Pleas is better suited to interpret and enforce the NESC. This argument is clearly wrong. The NESC involves a series of complex calculations based upon horizontal and vertical distances between structures and transmission lines, and the requirement that electrical utilities follow its standards is clearly mandated by the Ohio Administrative Code section governing utilities by the PUCO. No other body can interpret and enforce the NESC but the PUCO. A Court of Common Pleas has absolutely no experience interpreting and enforcing the NESC, nor do they have business attempting to do so.

However, despite the clear mandate in the Ohio Administrative Code and this Court's ruling in *Corrigan*, the PUCO shirked its obligations to interpret and enforce the NESC.

This Court, in *Corrigan, supra*, held that:

{¶ 15} We agree with the *DeLost* court that this type of case falls within the exclusive jurisdiction of PUCO. The first part of the *Allstate* test asks whether PUCO's

administrative expertise is required to resolve the issue in dispute. Ohio Administrative Code 4901:1-10-27(D)(2) requires that each electrical utility inspects its electric transmission facilities (circuits and equipment) at least once every year; the inspections are to be conducted in accordance with written programs. Ohio Administrative Code 4901:1-10-27(E)(1). 'These programs shall establish preventative requirements for the electric utility to maintain safe and reliable service. Programs shall include, but are not limited to, the following facilities

In addition electric utilities are required to comply with the American National standard institutes National Electrical Safety Code. Ohio Administrative Code 4901:1-10-06.

Id. at 268 (emphasis added).

The NESC is written because it deals with safe and reliable electrical transmission service. The Common Pleas Case filed by Ohio Edison raised the very issue of safe and reliable service based on tables published in the NESC³, in spite of the fact that the Easement does not mention "safety" as being governed by the Easement, and Ohio Edison's admission that there has never been an electrical transmission disruption with the 69kV lines at issue.

Therefore, the PUCO clearly has jurisdiction over the Complaint in this case, and this Court must order the PUCO to exercise this jurisdiction and cause them to order Ohio Edison to relocate the 69kV transmission lines, or declare that no safety issue exists with regard to the transmission lines and the structures at issue.

³ The NESC, in its preamble, declares that compliance with its standards is not mandatory.

Proposition of Law No.2:

The Appellants' Complaint was Not a Collateral Attack on the Common Pleas Court Judgment Because the Appellants' Complaint was Filed in the PUCO Before the Common Pleas Court Even Entered its Judgment.

Ohio Edison avoids the Appellants' citation to the clear authority outlined by this court as to the exclusive jurisdiction of the PUCO over service-related issues by taking the position that the Appellants' Complaint in the PUCO was a "collateral attack" on the Common Pleas Case.

Ohio Edison forgets that the Appellants' filed their Formal Complaint in the PUCO *Fourteen (14) months before* the Mahoning County Court of Common Pleas issued its judgment. Thus, at the time the Appellants' filed their Formal Complaint in the PUCO *there was no judgment to collaterally attack.*

Even if the Appellants' Formal Complaint filed with the PUCO were considered a collateral attack on the Court of Common Pleas case, collateral attacks are permissible in the PUCO. See, *Western Reserve Transit Authority v. Public Utilities Commission of Ohio* (1974), 39 Ohio St.2d 16, 313 N.E.2d 811.

R.C. 4905.26, on its face, permits 'any person, firm, or corporation' to file a complaint with the commission charging that the operation of a public utility is 'in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law * * *.' **This language is extremely broad, and would permit what might be strictly viewed as a 'collateral attack' in many instances.**

Upon receipt of a complaint pursuant to R.C. 4905.26, the commission is charged as follows:

*** * * if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof, and shall publish notice thereof in a newspaper of general circulation in each county in which complaint has arisen. Such notice shall be served and publication made not less than fifteen days nor more than thirty days before hearing and shall state the**

matters complained of. The commission may adjourn such hearing from time to time.

'The parties to the complaint shall be entitled to be heard, represented by counsel, and to have process to enforce the attendance of witnesses.'

Id. at 18 (emphasis added).

The PUCO Entry dismissing the Complaint set forth exactly why they have jurisdiction over this matter, and their expertise in interpreting the NESC is needed when it found that:

The only dispute concerns the remedy, i.e., whether the complainants' property or the power lines should be moved. The NESC only establishes minimum clearances. *It does not provide guidance on whether the structures or facility should be moved.*

(PUCO Entry February 23, 2011, ¶15.) (emphasis added).

*The fact the NESC does not specifically state whether the structures or the facility should be moved is the very reason the PUCO exists and their expertise is needed. The PUCO cannot avoid their legislatively created purpose and "pass the ball" on this matter. Further, Ohio Edison cannot be allowed to argue out of both sides of its mouth either, by arguing to this court that the PUCO has exclusive jurisdiction over these matters in one circumstance (*DeLost v. First Energy*), but not in this case.*

Therefore, this Court must rule that the PUCO has jurisdiction over the Appellants' Complaint and order it to decide the issues raised therein.

Proposition of Law No.3:

The Wilkes Can Simply File A Separate Complaint Seeking Redress for the Allegation of Discriminatory Treatment, and Cause Multiple Filings in the PUCO and Use Additional Judicial Resources.

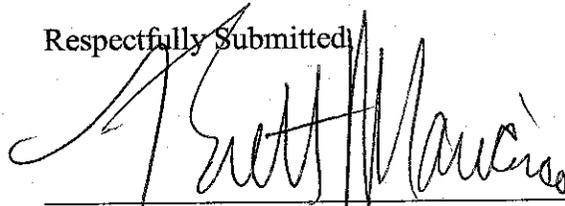
Ohio Edison does not argue that the principles of *res judicata* bar the filing of separate complaint against it, so rather than consolidate all causes of action in one proceeding for which they were clearly on notice, Ohio Edison argues exactly that: file multiple complaints and use extra judicial resources.

CONCLUSION

The decision of the PUCO in this case is fundamentally flawed and in direct contravention of this Court's clear holdings in *Corrigan v. Illuminating Company* and *State ex rel. Illuminating Company, supra*. The decision further undermines the purpose for which the PUCO has been established. Therefore, the decision of the PUCO must be reversed.

WHEREFORE, the Appellants respectfully request this Honorable Court to reverse the ruling of the PUCO that dismissed the Complaint, and hold that the PUCO has jurisdiction over the issues raised in the Complaint; cause the PUCO to order Ohio Edison to relocate the 69kV transmission lines at issue; or, in the alternative, declare that no safety issue exists with regard to the 69kV transmission line and the structures at issue; and order discovery to proceed on the issue of unfair and discriminatory treatment.

Respectfully Submitted,



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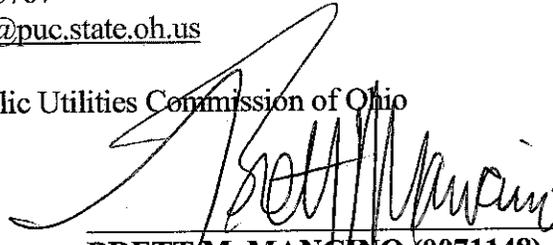
CERTIFICATE OF SERVICE

A copy of the foregoing has been served upon the following via regular U.S. Mail on
this 4th day of August 2011:

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